


MEMORANDUM

TO: County Council

FROM: Robert H. Drummer, Legislative Attorney 
Michael Faden, Senior Legislative Attorney

SUBJECT: **Public Hearing:** Expedited Bill 37-08, Personnel – Disability Retirement – Amendments

Expedited Bill 37-08, Personnel – Disability Retirement – Amendments, sponsored by Council President Andrews and Councilmember Trachtenberg, was introduced on December 9, 2008.

The County Inspector General recommended, in an interim report issued in September, that the Council consider amending the laws governing disability retirement to strengthen controls and provide better oversight of the process. The Executive also issued an internal work group report in August 2008 recommending several changes to the disability retirement laws. The Council then retained a consultant, Managed Care Advisors (MCA), to review the current process. MCA recommended a series of changes to the County disability laws to align the County's process with industry best practices.

Bill 37-08 would:

- (1) make disability retirement procedures consistent for all employees;
- (2) create a partial incapacity disability retirement benefit;
- (3) create a total incapacity disability retirement benefit;
- (4) create a Medical Review Panel;
- (5) create a Disability Review Board;
- (6) prohibit certain applications for service connected disability retirement due to an accident filed more than a certain time after separation from County service or the date of the accident;
- (7) prohibit an employee who commits certain offenses from retiring on a service connected disability;
- (8) require an independent medical examination for a disability retirement; and
- (9) modify the appeal procedures for disability retirement.

Legal Authority

Council staff has been asked about the Council's authority to enact this Bill because it would modify current laws which resulted from collective bargaining agreements or affect issues that are within the scope of collective bargaining with County employee unions. For the reasons discussed below, staff concludes that the Council has complete authority to enact legislation which affects a mandatory topic of collective bargaining or amends a law that was enacted to implement a collective bargaining agreement.

Delegation of legislative authority The current County Charter was adopted by the voters in 1968, as authorized by Article XI-A of the Maryland Constitution. Article XI-A, §3 provides that:

Every charter so formed shall provide for an elective legislative body in which shall be vested the law-making power of said City or County. Such legislative body in the City of Baltimore shall be known as the City Council of the City of Baltimore, and in any county shall be known as the County Council of the County.

* * *

...the County Council of said County, subject to the Constitution and Public General Laws of this State, shall have full power to enact local laws of said City or County including the power to repeal or amend local laws of said City or County enacted by the General Assembly, upon all matters covered by the express powers granted as above provided, and, as expressly authorized by statute.
(Emphasis added)

Charter §101 vests all of the County's legislative powers in the County Council as follows:

All legislative powers which may be exercised by Montgomery County under the Constitution and laws of Maryland, including all law making powers heretofore exercised by the General Assembly of Maryland but transferred to the people of the County by virtue of the adoption of this Charter, and the legislative powers vested in the County Commissioners as a District Council for the Montgomery County Suburban District, shall be vested in the County Council.....

The Maryland Court of Appeals has consistently restricted the delegation to private individuals of the legislative power assigned to a county council in a home rule charter county. See *Mugford v. Baltimore*, 185 Md. 266 (1945) (agreement with union to deduct dues from employees was an unlawful delegation of governmental power); *MCEA v. Anderson*, 281 Md. 496, 508 (1977) (arbitration to determine the compensation of public employees held to be an unlawful delegation of legislative authority); *Baltimore v. AFSCME*, 281 Md. 463 (1977) (MOU between union and employer could not bind the employer to propose certain budget appropriations for employee salaries). In *Office & Professional Employees v. Mass Transit Administration*, 295 Md. 88, 97 (1982), the Court opined with regard to collective bargaining:

It is established in this State that, absent express legislative authority, a government agency cannot enter into binding arbitration or binding collective bargaining agreements establishing wages, hours, pension rights, or working conditions for public employees.

The express legislative authority for a County to enter into binding collective bargaining agreements must flow from either a public general law enacted by the General Assembly or the County Charter. In this County it derives from the Charter. Charter §510 authorizes the Council to enact a collective bargaining law with binding arbitration for police officers. §510A does the same for career fire fighters, and §511 authorizes the Council to enact a collective bargaining law for other County employees.

The legislative history of the enactment of the first collective bargaining law for police officers in 1982 (Bill 71-81) indicates that the Council interpreted Charter §510 to require binding arbitration of collective bargaining impasses that is binding on the Executive, but not the Council. Both the Executive and the police union (Fraternal Order of Police Lodge 35 or FOP) agreed that §510 required the new collective bargaining law to include interest arbitration of collective bargaining impasses, but disagreed on whether the Council must be bound by an arbitration award as well as the Executive. The FOP argued at the Council worksessions that interest arbitration that was not binding on the Council could not be considered classic interest arbitration. The Council ultimately rejected this argument and the interest arbitration included in the Bill that was enacted did not bind the Council.¹

The Council enacted separate collective bargaining laws under each of these Charter amendments (Police: County Code §§33-75 through 33-85; County employees: County Code §§33-101 through 33-112; Fire and Rescue employees: County Code §§33-147 through 33-157). Each collective bargaining law provides that the Executive, as the employer, must bargain with the certified employee representative over certain mandatory topics of bargaining. Under each of these collective bargaining laws the Council must approve, and retains the authority to reject, any term or condition of a collective bargaining agreement that requires an appropriation of funds or enactment, repeal, or modification of a County law or regulation. **In none of these laws did the Council delegate its legislative power to enact and amend County legislation.** The Executive has a duty under each collective bargaining law to bargain with a certified employee representative; the Council does not.

For example, the most recent collective bargaining agreement executed by the Executive and MCGEO provided that "*the parties shall submit legislation* to the County Council that would establish a one-time irrevocable choice between the Retirement Savings Plan (RSP) and the Guaranteed Retirement Income Plan (GRIP) for non-public safety employees hired on or after July 1, 1994." (emphasis added) **The agreement did not bind, and could not have bound, the Council to enact the proposed legislation.** The Executive submitted this proposed legislation and the Council enacted it as Bill 11-08.

¹ This legislative history is described in the Office of Legislative Oversight Report No. 2009-5, pages 66-70, written by Leslie Rubin and issued on December 2, 2008.

The Council's exercise of the legislative power to implement the collective bargaining agreement negotiated by the Executive necessarily includes the power to repeal or amend the same legislation at any point in the future. This legislative power exists without regard to whether the law involves a mandatory topic of bargaining under the collective bargaining laws or was enacted to implement a collective bargaining agreement executed by the Executive and an employee representative; nothing in the Charter or the collective bargaining laws limits it in those cases.

For example, the current collective bargaining contract with the FOP covers disability retirement provisions in Article 57. See ©44-48. One section of Article 57 provides that the parties (the Executive and the FOP) would submit legislation to the Council to provide certain substantive and procedural provisions concerning disability retirement in 1997. The original agreement between the Executive and the FOP has been carried over to the current collective bargaining agreement without change. The parties implemented this agreement by submitting proposed legislation to the Council, and the Council enacted legislation in 1997 to implement this agreement. The enactment of this legislation was an exercise of legislative power that did not make the Council a party to the collective bargaining agreement and did not bind a future Council from exercising its same legislative power to amend the resulting laws.

Impairment of contracts. A closely related question is whether amendments to the County disability retirement laws of the kind contained in Bill 37-08 would impair a County employee's contractual rights in violation of the Contract Clause of the United States Constitution (Art. I, §10). In *Robert T. Foley Co. v. W.S.S.C.*, 283 Md. 140, 151-152 (1978), the Maryland Court of Appeals set the framework to determine if government action unconstitutionally impairs contractual obligations:

Consideration of a claim that particular governmental action invalidly impairs contractual obligations involves several steps. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17-21, 97 S. Ct. 1505, 52 L.Ed.2d 92 (1977). First, it must be determined whether a contract existed. If that hurdle is successfully cleared by the claimant, a court next must decide whether an obligation under that contract was changed. Finally, if the second question is answered in the affirmative, the issue becomes whether the change unconstitutionally impairs the contract obligation, '[f]or it is not every modification of a contractual promise that impairs the obligation of contract under federal law

In *Bd. of Trs. v. Mayor & City Council of Balt. City*, 317 Md. 72, 100 (1989), the Maryland Court of Appeals held that "under Maryland law, pension plans create contractual duties toward persons with *vested* rights under the plans." (emphasis added) As to when an employee's right to a disability pension vests, the Maryland courts have consistently held that a public employee's right to a disability pension does not vest until the occurrence or event -- the injury -- that would qualify the employee for the pension occurs. See *Davis v. City of Annapolis*, 98 Md. App. 707 (1994); *Saxton v. Bd. of Trustees of the Fire and Police Employees Retirement System of the City of Baltimore*, 266 Md. 690 (1972). Even if those rights have vested, every modification of a contract does not result in an unconstitutional impairment. The legislature

always retains the right to make reasonable modifications to vested rights for an important public purpose.

For these reasons, the substantive provisions of this Bill which modify eligibility for disability retirements do not raise an impairment of contract issue if they are applied to County employees who are injured after the effective date of the Bill. And, in our view, the procedural amendments can be applied to all County employees who fall within the scope of the disability retirement law because those procedural changes do not impair the employee's contract – i.e. the procedural changes do not diminish an employee's benefit and the employee has no vested right to a particular procedure. See, *Bd. of Trs. v. Mayor & City Council of Balt. City*, 317 Md. 72, 100 (1989).

This packet contains

Bill 37-08
Legislative Request Report
Bill Summary
Article 57

Circle

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Expedited Bill No. 37-08
Concerning: Personnel — Disability
Retirement - Amendments
Revised: 11/19/08 Draft No. 8
Introduced: December 9, 2008
Expires: June 9, 2010
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. , Laws of Mont. Co.

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Council President Andrews and Councilmember Trachtenberg

AN EXPEDITED ACT to:

- (1) make disability retirement procedures consistent for all employees;
- (2) create a partial incapacity disability retirement benefit;
- (3) create a total incapacity disability retirement benefit;
- (4) create a Medical Review Panel;
- (5) create a Disability Review Board;
- (6) prohibit certain applications for service connected disability retirement due to an accident filed more than a certain time after separation from County service or the date of the accident;
- (7) prohibit an employee who commits certain offenses from retiring on a service connected disability;
- (8) require an independent medical examination for a disability retirement;
- (9) modify the appeal procedures for disability retirement; and
- (10) generally amend the law regarding disability retirement.

By amending

Montgomery County Code
Chapter 33, Personnel and Human Resources
Sections 33-43, 33-128, 33-129, 33-135, and 33-138

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Section 33-43, 33-128, 33-129, 33-135, and 33-138 are amended as follows:

33-43 Disability retirement.

(a) *Applicability.* This Section applies to[(1)] an application for disability benefits filed [on or after March 1, 2000, by a member who is also a member of the Police Bargaining Unit; (2) an application for disability benefits after May 18, 1995,] by any [other] member[;] or [(3)] a medical reevaluation of a disability retiree under subsection (g)[, regardless of when an application for disability benefits was filed].

(b) *Definitions.* In this Section, the following words and phrases have the following meanings:

[(1)] *Applicant* means any member [defined in subsection (a)] who has filed an application for disability retirement under subsection (d)(1).

[(2)] *Certified representative* means an employee organization certified under Section 33-79, 33-106, or 33-151 to represent a bargaining unit.

[(3)] *Disability [Arbitration Board or Board] Arbitrator* means [the] one of [3 panels] the 4 neutral arbitrators designated under subsection (m)(1) to review an appeal of the Chief Administrative Officer's final decision regarding an application for disability benefits [filed by any member except a member of the Police Bargaining Unit].

[(4)] *Disability Review [Panel or Panel] Board* means the [3 medical doctors] the administrative board appointed [as Panel members] by the Chief Administrative Officer [in accordance with] under subsection (c).

Medical Review Panel or Panel means the 4 medical doctors

28 appointed as Panel members by the Disability Review Board under
 29 subsection (d).

30 ~~[(5)]~~ *Medical doctor* means a doctor of medicine or osteopathy who
 31 [has] graduated from a medical school accredited by the American
 32 Medical Association and [who] is licensed to practice medicine in [the
 33 State of] Maryland.

34 ~~[(6)]~~ *Medical specialty* means a field of medicine, such as orthopedic
 35 surgery or neurology, which requires specialized training and
 36 certification.

37 Occupational medicine means a medical specialty which focuses on
 38 the health of workers, including the ability to perform work; the
 39 physical, chemical, biological, and social environments of the
 40 workplace; and the health outcomes of environmental exposures.
 41 Practitioners of occupational medicine address the promotion of
 42 health in the work place and the prevention and management of
 43 occupational and environmental injury, illness, and disability.

44 Partial incapacity means a member's inability to perform one or more
 45 essential functions of the position the member holds because of
 46 impairment that is unlikely to resolve in the next 12 months and may
 47 be permanent, while the member retains the ability to perform
 48 substantial gainful activity.

49 *[(7) Police Disability Arbitration Board or Police Board* means the 3
 50 persons designated under subsection (m)(1) to review an appeal of a
 51 decision by the Chief Administrative Officer affecting a member of
 52 the Police Bargaining Unit's right to disability benefits.]

53 ~~[(8)]~~ *Residual functional capacity* means what the individual can still
 54 do, despite the individual's impairment. The County must give the

term residual functional capacity the same meaning as the term is given by the U.S. Social Security Administration.

[(9)] *Substantial gainful activity* means [the ability to perform a substantial level of paid work that exists in significant numbers in the national economy] a level of productive work that requires significant physical or mental duties, or a combination of both, performed for pay or profit on a full-time or part-time basis. An individual is able to perform a substantial level of work if the individual is able to earn more than the U.S. Social Security Administration's current monthly earnings limit [that applies to the individual's impairment] for a disabled person. The County must give the term substantial gainful activity the same meaning as the term is given by the U.S. Social Security Administration.

Total Incapacity means the member's inability to perform substantial gainful activity because of an impairment that is unlikely to resolve in the next 12 months and may be permanent.

(c) Disability Review Board.

(1) The Disability Review Board has 5 members.

(2) The Executive must appoint the following 3 voting, ex officio members of the Board, subject to County Council confirmation:

(A) the Director of Finance;

(B) the Director of Human Resources; and

(C) the Director of the Office of Management and Budget.

Each member must serve indefinitely while that member holds the respective office in either a permanent or acting capacity.

(3) The Executive must appoint for a 3 year term, subject to Council confirmation, 1 voting member from a list of 6 active

members of the retirement systems nominated jointly by the certified representatives of all bargaining units.

(4) The Executive must appoint for a 3 year term, subject to Council confirmation, 1 voting member who:

(A) is a resident of the County;

(B) has never been a County employee; and

(C) has experience in quasi-judicial administrative proceedings.

(5) Vacancy. The Executive must appoint, subject to Council confirmation, a replacement to serve the unexpired term of any member appointed under subsections (c)(3) or (4) who resigns or is unable to serve due to incapacity, death, or any other reason.

(6) Compensation. Each member serves on the Board without additional compensation from the County and without compensation for that service from any other source.

(d) Selection of the [Disability] Medical Review Panel.

(1) The [Chief Administrative Officer] Disability Review Board must appoint [the 3] 4 members of the [Disability] Medical Review Panel from a list of 10 medical doctors [agreed upon by the certified representatives and the County] provided by an impartial medical organization retained by the Chief Administrative Officer.

(2) The [Chief Administrative Officer] Disability Review Board must [ensure that no 2 members of the Panel practice in the same medical specialty] appoint at least 2 members who are either:

(A) certified by the American Board of Preventive Medicine
(or a successor organization) as a specialist in
occupational medicine; or

(B) certified in a different medical specialty and have at least
10 years of experience practicing occupational medicine.

(3) (A) The [Chief Administrative Officer] Disability Review
Board must appoint members under subsection (c)(1) for
 staggered 3-year terms. To implement the staggered
 terms, the [Chief Administrative Officer] Board must
 appoint the first member to a 3-year term, the second
 member to a one-year term, and the third and fourth
 [member] members to a 2-year term. After these initial
 appointments, the [Chief Administrative Officer] Board
 must appoint all members to 3-year terms, except for any
 member appointed under subsection (c)(6) to fill a
 vacancy [created by a Panel member's death, disability,
 resignation, non-performance of duty or other cause].

(B) After the [Chief Administrative Officer] Disability
Review Board appoints or reappoints a Panel member,
 the [Chief Administrative Officer] Board must promptly
 [provide] send each certified representative [with] a copy
 of the document confirming the appointment.

(4) [At the expiration of] When a Panel member's term expires, the
 Panel member [is eligible for reappointment] may be
reappointed to a new 3-year term [unless, at any time within 30
 days to 60 days prior to the expiration of the term, a certified
 representative notifies the County and the other certified

representatives or the County notifies the certified representatives that it objects to the reappointment of the Panel member. If there is no objection, the Panel member is eligible to serve an additional term or terms].

(5) [In the event] If a Panel member declines to be reappointed to the Panel, [a new medical doctor must be appointed by] the [Chief Administrative Officer] Disability Review Board must appoint a new Panel member from a list of 5 medical doctors [agreed upon by the certified representatives and the County] provided by an impartial medical organization retained by the County.

(6) If a vacancy on the Panel is created by a Panel member's death, disability, resignation, non-performance of duty, or other cause, the [Chief Administrative Officer] Disability Review Board must appoint a medical doctor to complete the Panel member's term[. The Chief Administrative Officer must appoint the Panel member] from a list of 5 medical doctors [agreed upon by the certified representatives and the County] provided by an impartial medical organization retained by the County.

(7) The County must pay the impartial medical organization retained by the County and each Panel member reasonable compensation, as determined by the Chief Administrative Officer, for [his or her] services rendered.

[(d)] (e) *Disability retirement procedures.*

(1) An application for disability retirement may be filed with the Chief Administrative Officer by:

(A) a member;

(B) a certified representative on behalf of a represented member; or

(C) the department, office, or agency head under subsection (k).

(2) [The Disability] Three members of the Medical Review Panel must consider [an] each application for disability retirement benefits filed by a member or a certified representative. [The Panel must determine if an applicant is eligible for non-service-connected disability or service-connected disability in accordance with subsections (e)(2) through (4) and subsection (f).]

(3) Subject to the limitations in subsection (f)(4)(E), the Panel may consider any information or material submitted by the applicant, the certified representative, or the County.

(4) Before the Panel meets to review an application for a member other than a member of the Firefighter/Rescuer Bargaining Unit, the Panel must advise each party of the deadline [date for submitting] to submit information to the Panel. The Panel must [allow] give each party a reasonable amount of time [for the parties] to submit additional information, and may extend the deadline at the request of either party for good cause [shown].

(5) Except for information from a member of the Firefighter/Rescuer Bargaining Unit, the Panel must not accept or consider information from a member if the information is received after the established deadline date unless the information is related to:

(A) [the applicant's] a reinjury to the applicant that occurred or was diagnosed after the deadline [date]; or

(B) a change in the applicant's medical condition that occurred or was diagnosed after the deadline [date].

(6) The Panel must meet [as a body] in person and review and consider all evidence submitted to it no later than 60 [calendar] days after the application is filed. A majority vote [on a decision] of 3 members is required to take any action [in accordance with the provisions of] under this Section. [will prevail. If only 2 Panel members participate in the decision-making process, the vote on a decision to take any action must be unanimous. No action may be taken upon a decision made by one Panel member] A dissenting member must issue a minority recommendation.

(7) [Within 30 calendar days after the Panel's last meeting at which the application was considered, the] The Panel must issue a written recommendation to the [Chief Administrative Officer] Disability Review Board [regarding whether the applicant meets the criteria for disability retirement benefits for non-service-connected disability in accordance with subsections (e)(2), (3) and (4) or service-connected disability in accordance with subsection (f)] on the following medical issues:

(A) Is the applicant mentally or physically incapable of performing one or more essential duties of the applicant's job as described in the current job description?

(B) Is the applicant's medical condition likely to be permanent?

(C) Did the applicant sustain the injury or undergo the hazard while performing his or her job duties?

(D) Does the applicant have the residual functional capacity to perform substantial gainful activity?

(8) (A) [If] Before making its recommendation, the Panel [is unable to make a determination based on the evidence presented to it, the Panel may] must:

(i) direct the applicant to undergo [a] an independent medical examination (including all relevant medical tests) by a medical doctor who is not a member of the [Disability Review] Panel; and

(ii) if required for the Panel to make a recommendation [under Section 33-43(i)(2)] as to residual functional capacity or substantial gainful capacity, request an independent vocational assessment.

(B) The County must pay the cost of the examination and assessment.

(C) The Panel must issue its written recommendation within 30 [calendar] days after the Panel receives the later of:

(i) the full report from the medical doctor who conducted the examination; or

(ii) the full report of the results of the independent vocational assessment.

(9) Within [20 calendar] 45 days [following receipt of] after receiving the Panel's written recommendation, the [Chief Administrative Officer or designee] Disability Review Board

must issue a final decision regarding whether the applicant meets the criteria for disability retirement benefits for non-service-connected disability [in accordance with] under subsection (e) or service-connected disability [in accordance with] under subsection (f) and, if the applicant meets the requirements for service-connected disability, whether the applicant is eligible for total or partial incapacity. The Board may:

(A) consider any evidence presented by the applicant or the County;

(B) review the applicant's personal file;

(C) review the applicant's worker's compensation file;

(D) review any accidental injury reports; and

(E) remand the case to the Medical Review Panel for further consideration.

(10) A disability retirement [is effective] takes effect on the earlier of:

(A) the date a member exhausts all accrued sick leave and accrued compensatory leave [in excess of] over 80 hours, if any, or [on]

(B) the date [the application is approved by] the [Chief Administrative Officer] Board approves the application [, whichever comes first].

(11) [For a Group G member, the] The amount of any lump sum retroactive disability retirement benefit must be reduced by the total amount of any temporary total disability, temporary partial disability, or permanent partial disability payments that the

County [made] paid to the employee under the Workers Compensation laws after [the effective date of] the disability retirement took effect.

[(e)] (f) * * *

[(f)] (g) *Service-connected disability retirement.*

(1) A member may be retired on a service-connected disability retirement if:

(A) the member is totally incapacitated for duty or partially and permanently incapacitated for duty as the natural and proximate result of an accident occurring, or an occupational disease incurred or condition aggravated, while in the actual performance of duty; [the incapacity is not due to willful negligence, and the incapacity is likely to be permanent. In extenuating circumstances, the Chief Administrative Officer may waive the requirement that a member's incapacity is likely to be permanent and may approve a temporary disability retirement for one or more one-year periods until the incapacity is either removed or it becomes apparent that it is likely to be permanent; and]

(B) the incapacity is not due to the member's willful negligence;

(C) the incapacity is likely to be permanent; [and]

(D) the member is unable to perform the duties of either:

(i) the occupational classification to which the member was assigned [at the time] when the disability occurred; or

(ii) a position of comparable status [within] in the same department for which the member is qualified;

(E) the member has not committed an offense that would justify removal for cause;

(F) for an accidental injury, the member:

(i) reports the claimed accidental injury at the time of the event;

(ii) applies for disability retirement within 1 year after separation from County service; and

(iii) applies for disability retirement within 5 years after the date of the claimed accident, unless the Board waives this requirement for good cause.

* * *

[(g)] (h) *Medical reexamination of disability retiree.* The Chief Administrative Officer may require a member receiving disability pension payments to undergo a yearly physical examination during the [5-year period following] 5 years after retirement, and once in every [3-year period] 3 years thereafter, until age 55 [if] for a member of group B, E, F, or G, or age 60 [if] for a member of group A or H. The Chief Administrative Officer must review the findings of the physical examination and take appropriate action, which may include submitting the results of the evaluation to the [Disability] Medical Review Panel and the Disability Review Board for a redetermination [as to] whether the individual qualifies for disability benefits in accordance with subsection [(d)] (e). If a member [refuses to] does not submit to the examination, the Chief Administrative Officer may

reduce or discontinue any disability pension payments which the member receives.

* * *

[(i)] (j) *Amount of pension at service-connected disability retirement.*

(1) Total incapacity. The County must pay a member[, other than a Group G member,] who retires on service-connected disability retirement with total incapacity an annual pension calculated under Section 33-42(b)(1), [subject to the following exceptions] except that:

(A) the County must substitute final earnings for average final earnings; and

(B) the pension must be at least [66 2/3 percent] 70% of the member's final earnings.

(2) [The County must pay a Group G member who retires on a service-connected disability retirement an annual pension calculated under Section 33-42(b)(1), except that the County must substitute final earnings for average final earnings.] However, if [this] the benefit calculation under Section 33-42(b)(1) is greater than any other benefit under this subsection, the County must pay a Group G member who retires on a service-connected disability retirement between June 26, 2002, and June 30, 2007, a pension based on the member's average final earnings if that member's average final earnings result in a greater benefit than final earnings.

(3) [The County must pay a Group G member who retires on a service-connected disability retirement an annual pension calculated under Section 33-42(b)(1), but the benefit must be at

350 least 70 percent of final earnings if the Chief Administrative
351 Officer finds, based on a recommendation from the Disability
352 Review Panel, that] The Disability Review Board, based on a
353 recommendation from the Medical Review Panel, must find
354 total incapacity if the member's service-connected disability is
355 severe enough to meet the Social Security Administration's
356 requirements for disability, meaning that the member is unable
357 to engage in any substantial gainful activity because of a
358 medically determinable physical or mental impairment that can
359 be expected to end in death or has lasted, or can be expected to
360 last, for a continuous period of at least 12 months. The member
361 does not have to qualify for Social Security disability benefits
362 to be eligible for benefits under this subsection.

363 (A) The Panel must base its [determination] recommendation
364 of whether [or not] an individual is able to engage in any
365 substantial gainful activity on an assessment from an
366 independent vocational expert that considers the
367 member's age, education, work experience, transferable
368 skills, and residual functional capacity.

369 (B) The Panel must determine the member's residual
370 functional capacity and provide this information to the
371 independent vocational expert.

372 (C) A Panel determination that the member's service-
373 connected disability is severe enough to be considered a
374 disability by the Social Security Administration is not a
375 recommendation that the member is entitled to, or should

376 be granted, a disability benefit by the Social Security
377 Administration.

- 378 (D) If a member has already been granted disability benefits
379 by the [U.S.] Social Security Administration when the
380 member applies for a service-connected disability
381 pension, the County must pay the member a pension of at
382 least [70 percent] 70% if the Disability Review [Panel]
383 Board finds that the award of disability benefits from the
384 Social Security Administration was based primarily on
385 the same medically determinable physical or mental
386 impairment on which the [Disability Review Panel]
387 Board awards the member a service-connected disability
388 benefit.

- 389 (4) The County must pay a [Group G] member who retires with
390 partial incapacity on a service-connected disability retirement
391 an annual pension calculated under Section 33-42(b)(1), but the
392 benefit must be at least 52½ % [percent] of final earnings [if the
393 Chief Administrative Officer finds, based on a recommendation
394 from the Disability Review Panel, that:

- 395 (A) the member meets the standards to receive a service-
396 connected disability benefit under subsection (f); and
397 (B) the member is not eligible to receive a benefit under
398 subsection (i)(3)].

- 399 (5) (A) The County must increase the partial incapacity service-
400 connected disability pension benefit of a [Group G]
401 member calculated under Section 33-42(b)(1), from a
402 benefit of at least 52 ½ [percent] % to a benefit of at least

70 [percent] %, if:

- (i) the [U.S.] Social Security Administration awards disability benefits to the member;
- (ii) the member submits all relevant information about the award of disability benefits from the Social Security Administration to the [Disability] Medical Review Panel within 60 days after the member receives the award;
- (iii) the Disability Review [Panel] Board, based on a recommendation from the Medical Review Panel, finds that the award of disability benefits from the Social Security Administration was based primarily on the same medically determinable physical or mental impairment on which the Disability Review [Panel] Board originally awarded the member a service-connected disability benefit; and
- ~~[(a)]~~ (iv) the member applies for disability benefits with the Social Security Administration within 90 days after the [date on which the Chief Administrative Officer] Board notified the member that the [amount of the] service-connected disability pension benefit would be calculated [under Section 33-42(b)(1), but at least 52 ½ percent; or] as a partial incapacity.
- (b) the Chief Administrative Officer awards a service-connected disability pension benefit

calculated under Section (b)(1), but at least 52 ½ percent to the member between March 1, 2000, and December 1, 2003, and the member applies for disability benefits with the Social Security Administration no later than February 29, 2004.]

(B) [For] If a member [who] qualifies for an increased pension benefit under [subsection (5)] subparagraph (A) [above], the County must increase the member's service-connected pension retroactively to the date [on which] when the pension began.

* * *

(7) The County must pay a Group F member who retires on a service-connected disability retirement with total incapacity on or after June 26, 2002, an annual pension calculated under subsection [(i)] (j)(1). However, if [the] a greater benefit results from the calculation under Section 33-42(b)(1), the County must pay a Group F member a pension based on the member's average final earnings if that member's average final earnings result in a greater benefit than final earnings.

[(j)] (k) *Adjustment or cessation of disability pension payments.*

(1) If a member receiving service-connected disability pension payments reaches the first day of the month [following] after the member's normal retirement date, the amount of pension then payable must not be less than the amount that would have been payable under [the provisions of] Section 33-45(c)[,] if the member had terminated service [on] when the [date] disability

pension [commenced] began and had not elected a return of member contributions with credited interest.

(2) (A) The Chief Administrative Officer may reduce the amount of the disability pension payments of a member retired with total incapacity who:

- (i) has not reached the normal retirement date; and
- (ii) is engaged in, or is able to engage in, an occupation that pays more than the difference between [the amount of] the disability pension payments and the current maximum earnings of the occupational classification from which the [employee] member was disabled.

(B) [For] If a member other than a Group F member [who] meets the criteria in subparagraph (A), the Chief Administrative Officer may reduce the member's disability [person] pension payments until [the amount of] the disability pension payments plus the amount that the employee earned or is able to earn equals the maximum earnings of the occupational class from which the member was disabled.

(C) [For] If a Group F member [who] receives a non-service connected disability pension and [who] meets the criteria in subparagraph (A), the Chief Administrative Officer may reduce the member's disability pension payments until [the amount of] the disability pension payments plus the amount the employee earned or is able to earn equals 120 percent of the maximum earnings of the occupational

class from which the employee was disabled. If a member receives a disability retirement pension from another employer for the same impairment, the Chief Administrative Officer may reduce the member's disability pension payments by the amount of the other disability retirement pension.

(3) If the earnings capacity of a disability retiree with a total incapacity changes, the Chief Administrative Officer may change the amount of the disability retirement pension. [For the purpose of] In this subsection, "disability pension" is the amount of pension payable without election of a pension payment option.

(A) For a disability retiree other than a group F member, [the Chief Administrative Officer must ensure that] the amount of the revised pension [does] must not exceed:

- (i) the original disability retirement pension plus all applicable cost-of-living increases; or
- (ii) an amount that, when added to the amount the member earns or is able to earn, equals the maximum earnings of the occupational classification from which the member was disabled.

(B) For a Group F member who receives a non-service connected disability pension, [the Chief Administrative Officer must ensure that] the amount of the revised pension must not exceed:

- (i) the original disability retirement pension plus all applicable cost-of-living increases; or
- (ii) an amount that, when added to the amount [that] the member earns or is able to earn, equals 120 percent of the maximum earnings of the occupational classification from which the member was disabled.

- (4) A member who receives a disability retirement pension for a total incapacity must submit to the Chief Administrative Officer by May 30 of each year a copy of that portion of the member's federal income tax return which shows the member's earned income. If a member [receiving] who receives disability pension payments [fails or refuses to] does not supply the Chief Administrative Officer [whatever] any information [is determined necessary] the Chief Administrative Officer needs to [make a decision on] decide the amount of retirement pay legally due, the Chief Administrative Officer must suspend the member's pension payments [must be discontinued] until the member submits the [requested] needed information.
- (5) If a member [receiving] who receives disability pension payments returns to [the service of the] County employment or is appointed or elected to any office, the salary or compensation of which is paid wholly or in part by the County, the Chief Administrative Officer must stop the member's pension payments [will cease,] and the [individual will again become a] member [of] must rejoin the retirement system and resume member contributions.

(6) For [those employees] any employee who enrolled or re-enrolled in the retirement system on or after July 1, 1978, the member's disability retirement benefit for any month must be integrated with the primary disability benefits received from Social Security, and the total benefits from both sources must not exceed 100% of the member's average final earnings. [of the member; provided, however, that this limitation] This limit does not apply to [the]- cost-of-living adjustments [issued pursuant to] made under Section 33-44(c).

(7) The Chief Administrative Officer must not reduce the service-connected disability pension payments of a Group F or G member by earned income received from [sources] any source other than County Government employment.

[(k)] (l) *Administrative disability retirement.* [Whenever] If any member becomes disabled [or incapacitated] and is demonstrably not capable of performing the duties and responsibilities of the position to which the member is assigned at an acceptable level of competence [for medical reasons] because of the member's disability, the Department or Office Director must notify the member [must be notified by the head of the department, office or agency] that [in consideration] because of the member's [medical condition] disability, the member should apply for a disability retirement [application should be initiated]. If the member [fails or refuses to make an application] does not apply for disability retirement, the [department, office or agency head] Director may [initiate] apply for a disability retirement [application] on behalf of the member. [All] The Director must transmit all pertinent information, including the member's attendance

record, job performance record, and medical record, [must be transmitted] to the [Disability] Medical Review Panel.

[(1)] (m) *Appeal procedures.*

(1) An applicant [who is a member of the Police Bargaining Unit] or the certified representative on behalf of the [Police Bargaining Unit] applicant may appeal a decision of the [Chief Administrative Officer] Disability Review Board that affects the member's right to disability benefits to the [Police] appropriate Disability [Arbitration Board] Arbitrator. [An applicant who is not a member of the Police Bargaining Unit, or the certified representative on behalf of the applicant, may appeal the written decision of the Chief Administrative Officer to one of 3 Disability Arbitration Boards.] An applicant must file an appeal within 20 [calendar] days [of] after [the date on which] the applicant receives the [Chief Administrative Officer's] Board's decision.

(2) The [Police] Disability [Arbitration Board] Arbitrator must consider [appeals] each appeal filed by [members of the Police Bargaining Unit. The 3 Disability Arbitration Boards must consider all other appeals on a rotating basis in the order in which the County receives the appeals] an applicant within a reasonable time.

[(3)] After an applicant files an appeal, the appropriate Disability Arbitration Board or Police Disability Arbitration Board with whom the appeal is filed must convene within a reasonable time and consider the appeal.]

590 [(4)] (3) The appeal and judicial review proceedings [are] must be
 591 governed by the Maryland Uniform Arbitration Act, except that
 592 [a Board] an Arbitrator's decision must not be vacated [on the
 593 ground that] because the applicant who filed the appeal is not a
 594 bargaining unit member and did not agree to arbitrate the
 595 appeal.

596 [(5)] (4) The [Chairpersons of the Disability Arbitration Boards and
 597 Police Disability Arbitration Board] Disability Arbitrator must[,
 598 for the appeals before them]:

599 (A) decide all issues on prehearing procedures, including any
 600 issue related to discovery; and

601 (B) rule on all issues of law that arise before the hearing[,]
 602 unless ruling on the issue would decide the appeal.

603 [(6)] (5) The Disability [Arbitration Boards and Police Disability
 604 Arbitration Board] Arbitrator must render decisions quickly.
 605 The Disability [Arbitration Boards and Police Disability
 606 Arbitration Board] Arbitrator should issue written decisions on
 607 appeals within 30 [calendar] days after the hearing or after
 608 receiving any post-hearing briefs.

609 [(m)] (n) *Disability [Arbitration Boards and Police Disability Arbitration*
 610 *Board] Arbitrators.*

611 (1) [(A) The County Executive must appoint a different
 612 neutral arbitrator to be the Chairperson of each Disability
 613 Arbitration Board.] The County Executive must [select
 614 the] appoint 4 neutral [arbitrators] Disability Arbitrators
 615 from a list of 6 arbitrators agreed [upon] on by the
 616 County and the certified representatives that represent all

bargaining units [except for the Police Bargaining Unit].
 To the extent possible, the 6 neutral arbitrators on the list
 should be experienced in law and occupational medicine.
 The County Council must confirm the appointment of
 [the Chairperson of each Disability Arbitration Board
 must be confirmed by the County Council] each
Disability Arbitrator. The [County] Chief Administrative
Officer must give each certified representative a copy of
 the Council resolution confirming the appointment or
 reappointment of each [Chairperson] Disability
Arbitrator promptly after the Council's action.

[(B) The County Executive must appoint a neutral arbitrator
 to be Chairperson of the Police Disability Arbitration
 Board. The neutral arbitrator must be selected by the
 County and the certified representative of the Police
 Bargaining Unit either by agreement or through the
 processes of the American Arbitration Association. To
 the extent possible, the neutral arbitrator should be
 experienced in law and occupational medicine. The
 appointment of the Chairperson of the Police Disability
 Arbitration Board must be confirmed by the County
 Council.]

(2) Each neutral arbitrator [appointed by the County Executive
 under paragraph (1)] must serve for a term of 3 years. [At the
 expiration of the] When an arbitrator's term expires, the
Executive may reappoint the arbitrator [is eligible for
 reappointment] to a new 3-year term unless, at any time within

30 to 60 days [prior to the expiration of] before the [3-year] term is scheduled to expire, either a certified representative [gives written notice to] notifies the [County] Chief Administrative Officer or the [County gives written notice to] Chief Administrative Officer notifies the certified representatives that [it] the party objects to the [neutral] arbitrator serving another term. If no objection is filed, the Executive may appoint the arbitrator [is eligible for appointment] to [an additional] another term.

(3) If the neutral arbitrator declines to be reappointed, dies, resigns, or for other cause is unable or ineligible to serve [on one of the] as a Disability [Arbitration Boards or the Police Disability Arbitration Board] Arbitrator, [a new arbitrator must be appointed by] the [County] Executive must appoint a new arbitrator under paragraph (1).

(4) The County must pay all reasonable fees and expenses of [the arbitrators] each arbitrator, as determined by the Chief Administrative Officer, except that a certified representative representing an applicant who is a member of the Office, Professional or Technical or Service, Labor and Trades Bargaining Unit must pay any fee resulting from the cancellation of a scheduled hearing if the certified representative:

(A) causes a hearing to be canceled and the application remanded to the Disability Review [Panel] Board; or

(B) causes a hearing to be canceled and rescheduled on a later date.

(5) [The applicant, or the certified representative on behalf of the applicant, must designate an individual to serve as a member of the Disability Arbitration Board that will consider and decide the applicant's appeal. The applicant must designate an individual to serve as a member of the Police Disability Arbitration Board. The Chief Administrative Officer must designate an individual to serve on the Disability Arbitration Board or Police Disability Arbitration Board that will consider and decide the applicant's appeal. The applicant, or the certified representative on behalf of the applicant, and the County, respectively, may designate Board members on a case-by-case basis according to each party's chosen procedure. There must be no restriction on who may serve as the designee of the applicant or the County, except that no member of the Board that will consider and decide an appeal may be involved in, or be a witness to, any matter that is before that Board.]

[(6) Each party, including participating agencies, must be responsible for the fees and expenses of its respective members.] Each party, including participating agencies, must [also be responsible for] pay its own witness fees and expenses.

33-128. Definitions.

In this Division, the following words and phrases have the following meanings:

[(a)] *Administrator* means either the Chief Administrative Officer or the entity that contracts with the County to administer this disability plan.

[(b)] *Applicant* means an employee who has filed an application for benefits under Division 2 of Article VIII, or for whom the Chief Administrative Officer has filed an application.

698 [(c)] *Certified representative* means an employee organization certified
 699 under Sections 33-79, 33-106, or 33-151 to represent a bargaining unit.

700 [(d)] *Continued non-service-connected disability* means a condition of the
 701 employee that:

- 702 (1) continues after [the close of] the period of initial non-service-
 703 connected disability closes;
- 704 (2) makes the employee unable to engage in any available
 705 employment commensurate with the employee's training or
 706 retraining, education, and experience [of the employee]; and
- 707 (3) is likely to be permanent.

708 [(e)] *Continued service-connected disability for a non-public safety*
 709 *employee* means a condition of a non-public safety employee that:

- 710 (1) continues after [the close of] the period of initial service-
 711 connected disability closes;
- 712 (2) makes the employee unable to engage in available employment
 713 commensurate with the employee's training or retraining,
 714 education, and experience [of the employee]; and
- 715 (3) is likely to be permanent.

716 [(f)] *Continued service-connected disability for a public safety employee*
 717 means a condition of a public safety employee that:

- 718 (1) continues after [the close of] the period of initial service-
 719 connected disability closes;
- 720 (2) makes the employee unable to:
 - 721 (A) engage in available employment commensurate with the
 722 employee's training or retraining, education, and
 723 experience [of the employee]; and
 - 724 (B) earn substantially similar final earnings; and

(3) is likely to be permanent.

[(g)] *County* means Montgomery County Government and, when applicable, any agency that adopts this plan under an adoption agreement approved by the Chief Administrative Officer.

[(h)] *Disability* [*Arbitration Board or Board*] Arbitrator means 1 of the 3 persons designated under Section [33-43A(m)] 33-43(m) to review an appeal of the final decision of the Administrator regarding an application for disability benefits.

[(i)] *Disability Review* [*Panel or Panel*] Board or Board means the [3 medical doctors appointed as Panel members by the Chief Administrative Officer under Section 33-43A(c)] administrative board established under Section 33-43(c).

[(j)] *Employee* means [an] a County employee [of the County] who:

(1) participates in the retirement savings plan under this Article;

and

(2) is regularly scheduled to work 20 hours or more per week.

[(k)] *Final earnings* means the annual average of the regular salary of an employee less any shift pay differential for the 18-month period immediately before the disability or any period of 18 consecutive months, whichever is greater.

[(l)] *Initial non-service-connected disability* means a condition of an employee that:

(1) is the natural and proximate result of an accident, illness, or injury;

(2) is not due to the employee's willful misconduct or willful negligence [of the employee];

(3) makes the employee incapable of performing the job that the employee performed immediately before the accident, illness, or injury; and

(4) is not an initial service-connected disability.

[(m)] *Initial service-connected disability* means a condition of an employee that:

(1) is the natural and proximate result of an accident, illness, or injury occurring, an occupational disease incurred, or a condition aggravated while in the performance of duty as an employee;

(2) is not due to the employee's willful misconduct or willful negligence [of the employee]; and

(3) makes the employee incapable of performing the job that the employee performed immediately before the accident, illness, or injury.

[(n)] *Medical doctor* means a doctor of medicine or osteopathy who [has] graduated from a medical school accredited by the American Medical Association and [who] is licensed to practice medicine in [the State of] Maryland.

Medical Review Panel or Panel means the 4 medical doctors appointed by the Disability Review Board under Section 33-43(d).

[(o)] *Non-public safety employee* means any employee who is not a public safety employee.

[(p)] *Plan* means the disability benefits plan established under this Division.

[(q)] *Public safety employee* means any employee who is a:

- (1) sworn, ranking officer of the [Montgomery County] Police Department;
- (2) paid firefighter, paid fire officer, or paid rescue service employee of the [Montgomery County Department of] Fire and Rescue [Services] Service;
- (3) sworn deputy sheriff;
- (4) [Montgomery County] correctional officer; or
- (5) correctional staff member, if designated as a public safety employee by the Chief Administrative Officer.

33-129. Disability benefits.

(a) *Initial non-service-connected disability benefits.*

- (1) An employee is entitled to receive disability benefits if the [administrator determines] Disability Review Board finds that the employee has:
 - (A) incurred an initial non-service-connected disability; and
 - (B) worked for the County for the 6 months immediately [preceding] before the disability.
- (2) The employee [is entitled to] may receive disability benefits subject to this plan for [a period of]:
 - (A) 12 consecutive months for a public safety employee; and
 - (B) 36 consecutive months for a non-public safety employee.

- (b) *Continued non-service-connected disability benefits.* Before the end of the distribution period for initial non-service-connected disability benefits, the [administrator] Disability Retirement Board must re-evaluate the employee to determine if the employee satisfies the requirements for a continued non-service-connected disability. If the employee does not meet the requirements for a continued non-service

connected disability, the payment of disability benefits must stop. If [a participant] the employee meets the requirements for a continued non-service connected disability, the payment of disability benefits must continue, subject to this plan.

(c) *Temporary disability.* In extenuating circumstances, the [administrator] Disability Retirement Board may:

(1) waive the requirement that an employee's disability is likely to be permanent for continued service-connected or non-service-connected disability benefits; and

(2) approve temporary disability benefits for one or more one-year periods until the [administrator determines] Board finds that the disability:

(A) has ended; or

(B) qualifies as a continued disability.

(d) *Initial service-connected disability benefits.* [If the administrator determines that an employee has incurred an initial service-connected disability, the] An employee [is entitled to] may receive disability benefits for a period of 36 consecutive months, subject to this plan, if the Disability Review Board finds that:

(A) the employee has incurred an initial service-connected disability;

(B) the employee has not committed an offense that would justify removal for cause;

(C) for an accidental injury, the employee:

(i) reports the claimed accidental injury at the time of the event;

- (ii) applies for disability retirement within 1 year after separation from County service; and
- (iii) applies for disability retirement within 5 years after the date of the claimed accident, unless the Board waives this requirement for good cause.

(e) *Continued service-connected disability benefits.*

- (1) Before the end of the distribution period for initial service-connected disability benefits, the [administrator] Disability Review Board must re-evaluate the employee to determine if the employee satisfies the requirements for a continued service-connected disability. If the employee does not meet the requirement for a continued service-connected disability, the payment of disability benefits must stop. If the employee meets the requirements for a continued service-connected disability, the payment of disability benefits must continue, subject to this plan.
- (2) The Chief Administrative Officer may offer a 5-percent salary increase to an employee who:
 - (A) is eligible to receive continued service-connected disability benefits; and
 - (B) accepts an alternative position [within the] in County government for which the employee is qualified.
- (3) The employee's salary in the alternative position must not exceed the maximum salary of the pay grade assigned to the position.
- (4) A member of the Office, Professional and Technical Bargaining Unit or the Service, Labor and Trades Bargaining Unit who

accepts an alternative placement [incentive is not eligible to] must not receive continued service connected disability benefits based on the disability for which the alternative placement was made.

(5) If a member applies for continued service-connected disability benefits instead of accepting an alternative placement [incentive], the member's [failure] decision not to accept the [incentive] placement must not:

(A) be included in the information [considered by] given to the [Disability] Medical Review Panel, Disability Review Board, [Chief Administrative Officer,] or Disability [Arbitration Board] Arbitrator;

(B) be considered at any time by the [Disability] Medical Review Panel, Disability Review Board, [Chief Administrative Officer,] or Disability [Arbitration Board] Arbitrator; or

(C) affect the member's eligibility for continued service-connected disability benefits or the amount of [the continued service-connected disability] those benefits.

(f) *Role of the [Disability] Medical Review Panel and the Disability Review Board.*

(1) The [Disability] Medical Review Panel must [consider an application for disability benefits] decide the medical issues necessary to determine if the applicant is eligible for disability benefits under subsection (a), (b), (c), (d), or (e). The Panel may consider any information or material submitted by the applicant, the certified representative, or the County. Within 60

days after the application is filed, the Panel must meet [as a body] in person to [consider] review all evidence submitted to the Panel. An action by the Panel under this Section requires [2 votes] a majority vote of 3 members. A dissenting member may issue a minority recommendation.

(2) Before the Panel meets to review [the] an application, the Panel must advise each party of the deadline [date for submitting] to submit information to the Panel. The Panel must allow a reasonable amount of time for the parties to submit additional information, and may extend the deadline at the request of the applicant for good cause [shown].

(3) The Panel must not accept or consider information from a certified representative representing an applicant if the information is received after the [established] deadline, [date] unless the information is related to:

(A) [the applicant's] a reinjury to the applicant that occurred or was diagnosed after the deadline [date]; or

(B) a change in the applicant's medical condition that occurred or was diagnosed after the deadline [date].

(4) Within 30 days after the Panel's last meeting to consider the application, the Panel must issue a written recommendation to the [Administrator on whether the applicant qualifies for disability benefits] Disability Review Board on the following medical issues:

(A) Is the applicant mentally or physically incapable of performing one or more essential duties of the applicant's job as described in the current job description?

(B) Is the applicant's medical condition likely to be permanent?

(C) Did the applicant sustain the injury, or undergo the hazard, while performing his or her job duties?

(D) Does the applicant have the residual functional capacity to perform substantial gainful activity?

(5) [If] Before making its recommendation, the Panel [cannot determine the applicant's eligibility for disability benefits based on the evidence presented, the Panel may] must require the applicant to complete a medical examination, including relevant medical tests, by a medical doctor who is not a member of the [Disability] Medical Review Panel. The County must pay the cost of the examination. The Panel must issue its written recommendation within 30 days after the medical doctor reports to the Panel.

(6) Within [20] 45 days after [the Administrator receives] receiving the Panel's recommendation, the [Administrator] Disability Review Board must issue a final decision [on] whether the applicant is eligible for disability benefits under this Section. The Board may:

(A) consider any evidence presented by the applicant or the County;

(B) review the applicant's personal file;

(C) review the applicant's worker's compensation file;

(D) review any accidental injury reports; and

(E) remand the case to the Medical Review Panel for further consideration.

33-133. Termination of benefits.

(a) *Non-public safety employee.* The Administrator must terminate initial or continued disability benefits to a non-public safety employee if the employee:

- (1) recovers from the disability, as determined by the [administrator] Disability Retirement Board;
- (2) does not provide the Administrator with information that the Administrator requires; or
- (3) attains age 65, or a later age if required under Federal law.

(b) *Public safety employee.* The Administrator must terminate initial or continued disability benefits to a public safety employee if the employee:

- (1) recovers from the disability, as determined by the [administrator] Disability Review Board;
- (2) does not provide the Administrator with information that the Administrator requires; or
- (3) attains age 65, or a later age if required under Federal law, if the benefit is for a non-service connected disability.

33-135. Medical examination.

(a) The Administrator may require any employee receiving continued disability payments to undergo annual or less frequent medical examinations. The Administrator must submit the findings of [the] any medical examination to the [Disability] Medical Review Panel.

(b) The Panel must consider the findings of the physical examination and any other information submitted by the employee or the County and recommend in writing to the [Administrator] Disability Review Board whether the employee still qualifies for disability benefits.

- (c) The [Administrator] Board must issue a final decision within 20 days after receiving the Panel's recommendation. An employee may appeal the [Administrator's] Board's decision under Section 33-138.

33-138. Appeals of decisions.

- (a) The applicant, or the certified representative on behalf of the applicant, may appeal [the] a written decision of the [Administrator] Disability Review Board on eligibility for disability benefits within 20 days after the applicant receives the [Administrator's] Board's decision.
- (b) The Disability [Arbitration Board] Arbitrator must [convene to consider] consider an appeal within a reasonable time [after the appeal is filed]. The appeal and judicial review proceedings [are] must be governed by Sections 3-201 through 3-234 of the Maryland Arbitration Act.
- (c) The Disability [Arbitration Board] Arbitrator [must issue the decision quickly. The Board] should issue the decision within 30 days after the hearing or receiving any post-hearing brief, whichever is later.
- (d) The County must pay all reasonable fees and expenses of the Arbitrator, as determined by the Chief Administrative Officer, except that a certified representative must pay any fee resulting from the cancellation of a scheduled hearing if the certified representative:
- (1) causes a hearing to be canceled and the application remanded to the [Disability] Medical Review Panel; or
 - (2) causes a hearing to be canceled and rescheduled on a later date.

Sec. 2. Implementation. Notwithstanding any other provision of law, including §33-80(a)(7), the implementation of any amendment to County Code Chapter 33 in Section 1 of this Act concerning disability retirement is not subject

to collective bargaining with a certified representative of employees in any bargaining unit.

Sec. 3. Transition. The Executive must appoint and the Council must confirm the members of the Medical Review Panel and the Disability Review Board within 90 days after this Act takes effect. The existing Disability Review Panel must review applications for a disability retirement filed during this transition period and make recommendations to the Chief Administrative Officer on the medical issues that the Medical Review Panel must decide under this law. The Chief Administrative Officer must review any recommendations of the Disability Review Panel made during this transition period and determine eligibility for a disability retirement until the members of the Disability Review Board are appointed and confirmed.

Sec. 4. Expedited Effective Date. The Council declares that this Act is necessary for the immediate protection of the public interest. This Act takes effect on the date when it becomes law and applies to all applications for disability retirement filed on or after that date.

Approved:

Philip M. Andrews, President, County Council

Date

Approved:

Isiah Leggett, County Executive

Date

LEGISLATIVE REQUEST REPORT

Bill 37-08

Personnel – Disability Retirement – Amendments

DESCRIPTION: The Bill would modify the procedures for determining eligibility for a disability retirement pension by establishing a new Disability Retirement Board to make decisions based upon recommendations as to medical issues from a new Medical Review Panel. The Bill would also create a partial incapacity disability and a total incapacity disability for ERS members.

PROBLEM: The Inspector General recommended, in an interim report issued in September, that the Council consider amending the laws governing disability retirement to strengthen controls and provide better oversight of the process. The Council retained a consultant, Managed Care Advisors (MCA), to review the current process. MCA recommended a series of changes to the disability laws to align the County's process with industry best practices.

GOALS AND OBJECTIVES: To improve the County's disability retirement standards and procedures.

COORDINATION: Inspector General, Human Resources

FISCAL IMPACT: Office of Management and Budget

ECONOMIC IMPACT: Office of Management and Budget

EVALUATION: N/A

EXPERIENCE ELSEWHERE: MCA reviewed disability laws in other jurisdictions and recommended best industry practices.

SOURCE OF INFORMATION: Inspector General
Joseph Adler, Office of Human Resources

APPLICATION WITHIN MUNICIPALITIES: N/A

PENALTIES: N/A

Bill 37-08, Personnel– Disability Retirement
Summary of Key Provisions

1. The Bill would modify the procedures for determining eligibility for a disability retirement pension to make them consistent for all employees as follows:

- Creates a **Medical Review Panel** consisting of 4 physicians, 2 of whom must be board certified in occupational medicine or have at least 10 years of experience in occupational medicine. The Medical Review Panel would replace the current Disability Review Panel and make recommendations on medical issues only. The current Disability Review Panel is responsible for making recommendations to the CAO on both medical and administrative decisions.
- The Executive would appoint the members of the Medical Review Panel, subject to Council confirmation, from a list of qualified physicians prepared by an impartial medical organization retained by the County to solicit and provide qualified applicants. The current Disability Review Panel is appointed jointly by the CAO and the employee unions.
- The Medical Review Panel must act with 3 members on each case. If only 2 members agree, the 3d member must write a minority recommendation. The current Disability Review Panel can act with 2 members and no minority recommendation is required. A minority recommendation would give the new Disability Review Board a more complete picture of the medical issues when there is a split vote by the Medical Review Panel.
- The Medical Review Panel must require an independent medical examination. Currently, the Disability Review Panel can, but often does not, require an independent medical examination.
- Creates a **Disability Review Board** to make decisions on disability retirements based upon the recommendations of the Medical Review Panel. The Board consists of 3 *ex officio* members (Dir. of Finance, Dir. of Management & Budget, and Dir. of HR), 1 current employee nominated by the employee unions, and 1 public member. The members are appointed by the Executive, subject to Council confirmation.
- The CAO no longer makes the disability decision. This would require an administrative board consisting of representatives of management, labor, and the public to make administrative decisions related to an employee's eligibility for disability.
- Changes the current Disability Arbitration Board to a single independent **Disability Arbitrator** to hear appeals of decisions made by the Disability Review Board. There would be 4 Disability Arbitrators pre-selected jointly by the County and the employee unions. Current law provides for a neutral arbitrator to chair a 3 person board with 1 member appointed by the CAO and 1 member appointed by

the employee unions. Current law also creates a separate Police Arbitration Board for appeals from members of the Police Department.

2. The Bill would make the following changes in the benefits for ERS members, including police and fire employees:

- Creates a service-connected disability with *total incapacity* with a minimum payment of **70%** of final earnings.
- Total incapacity requires an inability to perform substantial gainful activity based on the Social Security disability standard.
- Creates a service-connected disability with *partial incapacity* with a minimum payment of **52½%** of final earnings.
- Partial incapacity requires an inability to perform the essential functions of the current position while retaining the ability to perform substantial gainful activity. Current law provides for a minimum 66 2/3 % benefit for both total and partial disability for all employees other than members of Group G (Fire and Rescue). The Bill would extend the current Group G partial/total split benefit to all ERS members.
- Requires a one-for-one reduction in service-connected disability payments for any disability retirement payments received from another employer for the same impairment. Current law does not contain this provision.
- Prohibits an award of a service-connected disability pension to an employee who commits an offense that would justify removal for cause. Current law permits an employee who commits such an offense to receive a service-connected disability retirement.
- Requires a member to apply for a service-connected disability retirement due to an accidental injury within 1 year after separation from service and within 5 years after the accident occurred. There are no current restrictions on when applications for disability can be filed.
- Requires a member to report an accidental injury causing the incapacity that forms the basis of the disability at the time of the injury. Current law does not require such a report.

3. Other Points

- Disability benefits for Retirement Savings Plan (RSP) employees remain unchanged, although the procedures used to determine eligibility and appeals are modified to be consistent with the procedures for ERS employees. The RSP consists of non-public safety employees hired after October 1, 1994.
- The current RSP *continued service-connected disability pension* is **66 2/3%** until age 65 with dollar for dollar deductions for other group income maintenance insurance, Social Security disability benefits, any government disability plan, and the amount received from RSP. There is also a deduction of 1 dollar for every 3 dollars in earned income. Disability benefits for RSP members end at age 65.

- The Bill expressly provides that the amendments in the Bill are not subject to collective bargaining.
- This is an expedited Bill. The amendments would apply to any application for disability benefits filed after it becomes law.
- The Bill has a 90 day transition period for the Executive and Council to appoint members of the Medical Review Panel and the Disability Review Board. During this transition, applications would continue to be reviewed and decided by the existing Disability Review Panel serving in the role of the Medical Review Panel and the CAO serving as the Disability Review Board.

Article 57 Retirement

The Employer shall submit proposed legislation to the County Council that would amend Montgomery County Code Chapter 33, Article III to provide for the revisions in Sections B, I, J, K, and L affecting bargaining unit employees. [Bill 19-01 vetoed for reasons unrelated to this article. Emergency Bill 25-01 enacted.]

Section A. Preservation of Benefits. Except as provided in this Agreement, all unit members retain all the retirement benefits and conditions previously in effect between the parties. [See Side Letter.]

Section B. Pension Formula. Subject to section I, a Group F member who retires on a normal or disability retirement, subject to sections D and G the annual pension must equal 2.4 percent of average final earnings multiplied by years of credited service, up to a maximum of 30 years, plus sick leave credits. Years of credited service of less than one full year must be prorated. Sick leave credits used for years in excess of 30 years must be credited at 2% of average final earnings. The maximum benefit with sick leave credits must not exceed 76% of average final earnings.

Section C. Military Credit. It is recognized that legislation enabling County employees to purchase pension credit for military service is pending before the Council. If such legislation is duly enacted, members of the bargaining unit shall not be precluded from exercising rights afforded by that statute.

Section D. Disability Benefit. It is agreed that police officers eligible for a service connected disability pension shall continue to receive a minimum benefit of 66 2/3% of final earnings.

Section E. Disability Procedures. The parties previously agreed that upon implementation of Section D, they would meet to negotiate changes to Bill No.36-94 to achieve certain objectives in establishing disability procedures applicable to unit members. Those objectives have been modified and the following is agreed and legislation shall be submitted to accomplish the following changes to the Retirement Law, in effect as of October 27, 1997:

1. Members of the bargaining unit shall have a right to appeal the final determination of the CAO to a tripartite panel, as provided under §33-43A of the Retirement Law, except that the neutral shall be selected by Lodge 35 and the County pursuant to the procedure used to select an impasse neutral under §33-81 of the Police Labor Relations Act.
2. The Disability Panel that rules upon applications for disability benefits of members of the bargaining unit shall be selected in accordance with the procedures set out in §33-43A of the Retirement Law, in effect as of October 27, 1997.
 - a. The applicant and the County shall submit all medical information pertaining to the medical condition of the applicant to the Disability Review Panel, consistent with procedure and requirements as may be agreed by Lodge 35 and the County. The Panel will inform the parties that the record is complete and of its intent to initiate its review. In the event that either party wishes to supplement the record upon notice from the Panel that it is prepared to begin its review, the Panel shall set a final date, allowing a reasonable amount of time, to submit additional medical documentation.
 - b. After the final date for supplementation of the medical record, additional medical information will be considered by the Panel or Disability Arbitration Board only if it pertains to reinjury or modification of the medical condition occurring or diagnosed subsequent to the date the Panel's medical record was closed.
3. The right of appeal shall extend to "any decision" of the CAO affecting a member's right

to benefits, rather than only to "the written decision" of the CAO.

4. The certified representative of police officers shall not be obliged to designate an individual to serve as a member of the Disability Arbitration Panel.
5. Section 33-43A (l)(1) of the Retirement Law, in effect as of October 27, 1997, is inapplicable to Lodge 35.

Section F. Amendments. During January 1996, the Employer submitted to the Montgomery County Council the below described amendments to the Employees' Retirement System.

1. *Section 33-35. Definitions.* A definition of "picked-up contributions" is added, references to picked-up contributions are added to the definitions of "accumulated contributions" and "member contributions", and the definition of "regular earnings" is amended by adding a paragraph which states that the maximum compensation which can be used as regular earnings for the determination of benefits is limited by §401(a)(17) of the Internal Revenue Code, and beginning on July 1, 1996, the limitation is \$150,000.
2. *Section 33-37(e) Retirement plans.* In subsection (3)(A), the statement is added that any additional contributions that an employee in the integrated plan must make to reenter the optional plan cannot be treated as picked-up contributions. Subsection (3)(B) is added to state that a member of the integrated plan who is not a member of social security will be treated as if he is a member of the optional plan and will have to pay any additional contributions required under the optional plan.
3. *Section 33-37(g) Transfer from one group to another.* A sentence is added to state that, if a Group D member transfers to Group F, any additional contributions which the employee must make to transfer to Group F may not be treated as picked-up contributions.
4. *Section 33-39 (c) Return of member contributions.* In subsection (3), a statement is added that picked-up contributions will not be refunded to an employee who elects to switch from the optional plan to the integrated plan.
5. *Section 33-41. Credited service.* Subsection (a)(7) is added which states that employee contributions to buy past service cannot receive the tax treatment given to picked-up contributions. Subsection (c) is amended to state that an employee must be given credit for any military service (previously only compulsory service was covered), and states the conditions under which service credit will be given. In subsection (h), language is added to state that the chief administrative officer ["CAO"] may provide regulations to ensure the favorable income tax treatment of picked-up contributions from other State retirement systems. Subsection (i) is changed to reflect that only a vested member may purchase prior service credits. In subsection (j), a reference to §33-45(a) is added, which allows a member to transfer service credit from the State of Maryland and to use it for vesting purposes. Subsection (o) is added to preclude a member from purchasing credited service from a defined contribution plan.
6. *Section 33-42(i) Maximum annual benefit.* Language is added to subsections (1), (5), and (8) to state that the maximum annual benefit must be determined in accordance with §415 of the Internal Revenue Code.
7. *Section 33-43(d) Non-service connected disability retirement.* Previously, a member was not eligible for a non-service connected disability retirement if the individual was eligible for a normal retirement. In subsection (1)(c), this requirement is removed for applications

filed after October 15, 1992, because of amendments to the Age Discrimination in Employment Act.

8. *Section 33-44(o) Direct rollover distributions.* This subsection is added to provide for the direct rollover of certain refunds from this retirement system to any other eligible retirement plan.
9. *Section 33-45(a) Eligibility for vesting.* This section is amended to allow a member to use service credit transferred from the State of Maryland for vesting purposes.
10. *Section 33-46(e) Spouse's and children's benefits in the event of the death of an active member after eligible for vesting or retirement.* Language is added to state that the contributions that the payee is to receive will include picked-up contributions.
11. *Section 33-47(e) Payment of expenses and contributions.* Language is added to this section to clarify the role of the CAO.
12. *Section 33-54. Exemption from execution, garnishment, or attachment.* A new last paragraph is added to comply with Maryland law which regards retirement benefits as marital property that may be divided or assigned upon a separation or divorce. The amendment also provides that these distributions will be made in accordance with the Internal Revenue Code, and requires the CAO to establish forms and procedures to accomplish such distributions.

Section G. Non-Service Connected Disability. The minimum benefit for non-service connected disability shall be 33.33% of final earnings.

Section H. Cost of Living Adjustment for employees who became members of the Employees' Retirement System on or after July 1, 1978.

1. The annual cost-of-living adjustment for employees who enrolled in the Employees' Retirement System on or after July 1, 1978 shall be 100% of the change in the consumer price index up to three (3%) percent and 60% of any change in the consumer price index that is in excess of three percent (3%). However, except as provided in Section H.2 *infra*, the CPI adjustment shall not be more than 7.5%.
2. The existing portion of Retirement Law section 33-44(c)(3): "retired members who are disabled shall not be subject to this maximum and pensioners age sixty-five (65) or older shall also not be subject to this maximum with respect to [the] fiscal year beginning after the date of attainment of age sixty-five (65)" shall remain in effect, except that the maximum shall be "7.5%" as referenced in subsection H.1 above.

Section I. Benefit upon social security retirement age. Upon attainment of the social security normal retirement age, members enrolled in the integrated retirement plans shall receive, 1.65 percent of average final earnings up to the maximum of 30 years and 1.25 percent for credited years in excess of 30, up to the Social Security maximum compensation level in effect on the date of retirement. All other integration provisions shall remain in effect.

Section J. Amount of contributions. For employees in the Optional Retirement Plan, the contribution is 8.5% and for employees in the Integrated Plans, the contribution is 4.75% up to the maximum Social Security Wage Base and 8.5% of regular earnings in excess of the Wage Base.

Section K. Domestic Partner Benefits. Subject to IRS qualification rules and requirements, a domestic partner of a unit member eligible to receive domestic partner (including opposite sex domestic partners)

benefits under Article 24 of this agreement shall be eligible to receive retirement benefits, subject to the adoption of legislation submitted by the parties to amend appropriate sections of Chapter 33 of the Montgomery County Code to the same extent as a "spouse" under the Employees' Retirement System, provided all eligibility requirements are met. This provision shall be renegotiated in the event the IRS determines that the provision violates any rule or requirement.

Section L. Pension Payment Option. At retirement, a member may elect a "pop-up" variation of a Joint and Survivor option with an appropriate actuarial reduction.

Section M. Other Retirement Changes

1. *Disability Retirement - Offset of Earnings.* The Employer will submit legislation to amend Section 33-43(j) of the Code to provide for the following:
 - a. A Group F member must not have the member's service-connected disability pension payments reduced by other income received from sources other than County Government employment.
 - b. Whenever the chief administrative officer determines that a Group F member, who has not yet reached normal retirement date, receiving non-service connected disability pension payments is engaged in or is able to engage in a gainful occupation paying more than the difference between the amount of disability pension payments and 20% above the current maximum earnings of the occupational classification from which disabled, the amount of the member's disability pension payments may be reduced to the point at which the amount of disability pension payments plus the amount earnable equals 20% above such maximum earnings.

Whenever a Group F disability retiree's earnings capacity is changed, the amount of non-service connected disability retirement pension may be further modified by the chief administrative officer. The amount of the revised pension must not exceed the original disability retirement pension plus cost-of-living increases or an amount which, when added to the amount earnable by the member, equals 20% above the maximum earnings of the occupational classification from which disabled. For the purpose of this subsection, "disability pension" is the amount of pension payable without the election of a pension payment option.

The parties further agree that these provisions shall remain a part of the contract.

- c. The parties agree that the Code Section 33-43(h) and (i) shall be interpreted and applied as meaning that an integrated employee who retires on disability shall receive the benefit s/he would have received if there were no integration provisions.
2. *Social Security.* The parties agree to jointly study the effect of Social Security integration on benefits received at Social Security age. The study shall be completed by November 15, 2003.
3. *Spouse's or Domestic Partner's and children's benefits of a member whose death is service-connected.* The Employer will submit legislation to amend Section 33-46(b) of the Code to provide for the following:

If a Group F member dies while in the service of the County or a participating agency and satisfactory proof that death was the result of injuries sustained in the line of duty or was directly attributable to the inherent hazards of the duties performed by the member is submitted and the death was not due to willful negligence, payments to the spouse, or domestic partner, and children of the member shall equal the benefit that such

beneficiaries would have received under subsection (c) of this section had the employee been service-connected disability retired on the date of death. For purposes of this section, the form of retirement shall be a 100-percent joint and survivor pension option. The parties further agree that these provisions shall remain a part of the contract.

[Note: This reflects new language for Group F. Members. Job Sharers receive full disability benefits. This section is intended to retain that level of benefit in the event of death.]

4. *Trial Retirement.* The Employer shall submit proposed legislation to the County Council that would amend Section 33-38(f) of the County Code to provide for the following, effective July 1, 2005:
 - a. to permit bargaining unit employees to participate in the trial retirement option;
 - b. to amend Section 33-38(f)(6) to provide that the Chief Administrative Officer must return the member to the position the bargaining unit employee held before retirement if it is still available or to a position with an equivalent salary and grade in the Police Department when such a funded position becomes available; and
 - c. to delete Section 33-38(f)(6)(B), which provides that, if the same or an equivalent position is not immediately available, the Chief Administrative Officer must temporarily assign the employee to a special projects office in the Office of Personnel.
5. *Retirement Savings Plan.* The Employer shall submit proposed legislation to the County Council that would amend Section 33-115 of the County Code to permit bargaining unit employees in Group F who have reached the maximum service credits under the provisions of the Employees' Retirement System to transfer from the Employees' Retirement System to the Retirement Savings Plan.
6. For service-connected disabilities effective June 26, 2002 under this subsection, "final earnings," for a Group F member will not be less than average final earnings used in determining the annual pension calculated under Section 33-42(b)(1), except in the case where average final earnings is greater than final earnings due to solely a temporary promotion.